Supreme Court, U.S.
FILED
APR 15 1992
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No. 91-1263

In the Supreme Court of the United States

OCTOBER TERM, 1991

SEWELL-ALLEN BIG STAR, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably exercised its discretion in ordering petitioners to bargain with the union despite the passage of time and employee turnover that occurred while petitioners were litigating their obligation to bargain.

2. Whether the Board correctly ruled that petitioners violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition from and refusing to bargain with a successor union after its merger with the incumbent union.

3. Whether the Board properly attributed to petitioner Baker Bros. the antiunion conduct of its supervisors in finding that Baker Bros. violated Section 8(a)(1) of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A229-A242) is unreported, but the judgment is noted at 943 F.2d 52 (Table). The decision and order of the National Labor Relations Board (Board) (Pet. App. A180-A228), including the recommended decision of the administrative law judge (ALJ) (Pet. App. A1-A150), is reported at 294 N.L.R.B. 312.

JURISDICTION

The decision of the court of appeals was filed on August 23, 1991. A petition for rehearing and rehearing en banc was denied on November 1, 1991.

Pet. App. A243-A244. The petition for a writ of certiorari was filed on January 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Sewell-Allen Big Star, Inc., Baker Bros., Inc., Gilbert Allen Big Star, Inc., and SMF Management, Inc., each operate one or more retail grocery stores in the Memphis, Tennessee, area. Prior to 1982, petitioners' meat department employees were represented by United Food and Commercial Workers International Union Local 452 (Local 452). Each bargaining unit was covered by a collective bargaining agreement which was to expire on October 30, 1982. Pet. App. A230.

In January 1982, officials of incumbent Local 452 agreed to merge Local 452 into United Food and Commercial Workers International Union Local 1529 (Local 1529 or Union). Pet. App. A231. The membership of Local 452 voted to approve the merger, which became effective on April 1, 1982. *Ibid.* Nonmembers were excluded from voting on the merger. *Id.* at A182.

On April 7, 1982, Local 1529 notified each petitioner in writing that the Local 452 membership had approved the merger, and that Local 1529 would function as the representative of bargaining-unit employees. Pet. App. A182-A183. Following this notification, petitioners voluntarily recognized Local 1529 as the successor to Local 452. *Id.* at A194. Petitioners continued to process grievances, to make employee benefit fund contributions, and to remit union dues. *Id.* at A183.

During the summer of 1982, however, three supervisors employed by Baker Bros. began circulating a

decertification petition against the Union. As part of their campaign to oust the Union, these supervisors, who were members of the bargaining unit, told employees that Al Baker, owner and president of Baker Bros., would not sign a new contract with Local 1529, that management would reward them with better wages and benefits if they ousted Local 1529, and that those employees who supported the Union would lose their jobs. *Id.* at A191. After the decertification petition was filed with the Board, Al Baker thanked the employees for their support and stated that the company would run more smoothly once he had gotten rid of all the "interruptions." *Ibid.*

Petitioners and Local 1529 conducted initial bargaining sessions for new labor contracts in early October 1982. On November 8, 1982, however, after the collective-bargaining agreements had expired, petitioners notified Local 1529 that they no longer recognized it as the lawful bargaining representative of their employees, claiming that the April 1982 merger was invalid because nonmembers of Local 452 had not been permitted to vote. *Id.* at A183-A184. Petitioners refused to bargain further with the Union, and proceeded to implement unilateral changes in terms and conditions of employment. *Id.* at A200-A201.

2. The ALJ found (Pet. App. A1-A144) that petitioners' withdrawal of recognition from and refusal to bargain with Local 1529 violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). The ALJ also found that Baker Bros.' anti-union tactics constituted independent violations of Section 8(a)(1) of the Act.

The Board affirmed. Pet. App. A180-A228. The Board found that petitioners had "continued to deal with Local 1529 over a 7-month period in the iden-

tical manner with which they had dealt with Local 452." Pet. App. A184. This course of conduct, in the Board's view, "constituted an acceptance of the representative status of Local 1529." *Ibid.* Additionally, the Board found that Local 1529 relied to its detriment on petitioners' recognition of its status as bargaining representative "because it took no action to reestablish its status during the 7-month period between the notice of the merger and [petitioners'] withdrawal of recognition." *Ibid.* Relying on well-settled law,[1] the Board concluded that petitioners were estopped from raising the validity of the merger as a defense to the Section 8(a)(5) and (1) charges. *Ibid.* The Board also agreed with the ALJ that the policies underlying Section 10(b) of the Act[2] barred petitioners from challenging the majority status of Local 1529 because their challenge came more than six months after they had accepted Local 1529 as the successor to Local 452. *Id.* at A185.

The Board also affirmed the ALJ's determination that Baker Bros. committed independent unfair labor practices. In particular, the Board found that the anti-union conduct of the Baker Bros. supervisors in fostering decertification efforts was properly attributable to Baker Bros., because Al Baker "furthered

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[1] *El Torito-La Fiesta Restaurants*, 284 N.L.R.B. 518, 519-520 (1987), enforced mem. in relevant part, 852 F.2d 571 (9th Cir. 1988); *Ventura County Star-Free Press*, 279 N.L.R.B. 412, 419 (1986); *Knapp-Sherrill Co.*, 263 N.L.R.B. 396, 398 (1982), and 268 N.L.R.B. 800, 801 n.3 (1984).

[2] Section 10(b), 29 U.S.C. 160(b), provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

the reasonable perception that [the supervisors] were acting for and on behalf of management when they circulated the [decertification] petition * * *, solicited signatures, and made repeated coercive statements to the employees concerning the likely favorable management reaction." *Id.* at A192.[3]

The Board ordered petitioners to "bargain[], on request, with the Union as the collective-bargaining representative of their employees in the appropriate units." Pet. App. A202.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A229-A242. The court agreed with the Board that Section 10(b) barred petitioners' challenge to the validity of the merger because petitioners had failed to challenge the merger within six months after they received "unambiguous" notice thereof. Pet. App. A235-A237. The court also agreed that petitioners were estopped from challenging the merger because they had recognized and dealt normally with the Union until after the contracts expired, thus causing the Union to rely on petitioners' recognition of its status. *Id.* at A237-A238.

The court also upheld the Board's finding that the conduct of the Baker Bros. supervisors was properly attributable to Baker Bros. for purposes of Section 8(a)(1). Pet. App. A240-A242. The court found

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[3] The Board also found that Al Baker violated Section 8(a)(1) by promising employees improved working conditions if they would decertify Local 1529 (Pet. App. A190 n.10, A200), and by interrogating an employee concerning his union activities (*id.* at A240 n.2, A199), and that Baker Bros. also committed other Section 8(a)(1) violations (Pet. App. A198-A200). In addition, the Board found that petitioner Sewell-Allen Big Star, Inc. committed various acts of anti-union conduct in violation of Section 8(a)(1). *Id.* at A195-A198. Petitioners do not seek review of those rulings.

both that Al Baker ratified the supervisors' activities and that other evidence "supports the inference that [the supervisors] acted with Baker's approval." *Id.* at A242.

ARGUMENT

1. Petitioners assert (Pet. 5-10) that enforcement of the Board's order requiring them to bargain with Local 1529 would be inappropriate because of what petitioners characterize as the Board's "gross delay" in rendering its decision. This claim is not properly presented, and in any event lacks merit.

a. Petitioners did not raise this claim before the Board.[4] Since petitioners have pointed to no "extraordinary circumstances" that would excuse their failure to exhaust their administrative remedies, the courts lack jurisdiction to consider their claim. See Section 10(e), 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

b. In any event, there is no merit to petitioners' contention that the Board's delay precludes enforcement of its order. Petitioners assert (Pet. 6) that "there is little or no reason to suppose the Union has majority support after so great a length of time," but this Court has held that a union's loss of majority status during delays due to litigation does not terminate an employer's obligation to bargain. See *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962); *Franks Bros.* v. *NLRB*, 321 U.S. 702, 703-706

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[4] Such a claim could have been raised before the Board via a motion for reconsideration, rehearing, or reopening of the record. See 29 C.F.R. 102.48(d)(1).

(1944). While noting that "[i]nordinate delay in any case is regrettable," the Court has rejected the contention that enforcement of a bargaining order should be denied or conditioned on the holding of a new election because of the Board's delay in issuing the order, even when the employees have subsequently repudiated the union. *Katz*, 369 U.S. at 748 n.16.

Nor are petitioners correct in asserting (Pet. 5-7) that the decision of the court below creates a conflict among the circuits. In both *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398 (5th Cir. 1991), and *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d 1087 (7th Cir. 1984), the courts exercised their equitable discretion to deny enforcement of the Board's bargaining orders based in part on the Board's delay. In both cases, however, the courts relied on factors in addition to administrative delay to justify their decision, including in particular the existence of persuasive evidence that the unions involved had lost majority status.[5] Petitioners presented no such evi-

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[5] In *Texas Petrochemicals*, for example, the employees submitted unsolicited petitions showing that a majority of members of the bargaining unit no longer wanted union representation; the court referred to the petitions as "significant facts which must be considered by this court." 923 F.2d at 405. In denying enforcement of the bargaining order, moreover, the court made clear that the mere fact of Board delay was not the sole basis for its decision, which was instead based on "all of the facts in th[e] record." *Id.* at 406. Similarly, in *Continental Web Press*, an employee petition circulated during the period of litigation delay showed that 59 of the 72 members of the bargaining unit no longer wanted union representation. 742 F.2d at 1094. As the court stated, "[a]ll of these things considered, the probability that the union still has the support of a majority of the [employees] is small." *Id.* at 1095. The court accordingly indicated that it would not enforce a bargaining order. *Ibid.*

dence in this case, and thus *Texas Petrochemicals* and *Continental Web Press* are inapposite.[6]

Finally, there is no merit to petitioners' contention that review by this Court is warranted because "gross Board delay * * * continues to be a recurrent problem." Pet. 9. The problem of Board delay has recently been substantially mitigated and is unlikely to recur.[7] Accordingly, review is not warranted.

2. Petitioners assert (Pet. 10-11) that the Board and the court of appeals erred in applying the policies underlying Section 10(b) to bar their challenge to the validity of the merger of Locals 1529 and 452. This contention does not merit review.

First, Section 10(b) was only an alternative ground for the rejection of petitioners' challenge to the merger. The Board also found, and the court of appeals agreed, that petitioners were estopped from

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[6] Petitioners offered no evidence that the Union now lacks majority support; instead they merely assert that "the vast majority of the present meat market employees were not even employed in 1982." Pet. 5. The mere change in personnel does not, of course, suffice to rebut the normal presumption of majority union support. See, *e.g.*, *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-39 (1987); see also *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) (employer not entitled to indulge presumption that striker replacements for union members oppose the union).

[7] The Board has implemented the recommendations of the General Accounting Office that it put into place a time limit for each decision stage as well as for final issuance of decisions. Moreover, the Board has reduced its backlog from 1,679 unfair labor practice and representation cases in February 1984 to 523 cases in January 1991. See Statement of James M. Stephens, Chairman of the National Labor Relations Board, *Department of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1992: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 102d Cong., 1st Sess. Pt. 7, at 593 (1991).

questioning the validity of the merger by virtue of their earlier conduct ratifying the merger and the Union's reliance thereon. Petitioners do not challenge that finding, which is dispositive of their claim. Thus, review of the Section 10(b) issue by this Court could not change the outcome of the case.

Second, the Board's ruling that the policies underlying Section 10(b) barred petitioners' attack on the merger was correct, and does not conflict with *Local Lodge No. 1424* v. *NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960). In *Bryan Mfg.* this Court held that, where "a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint," the policies underlying the Section 10(b) limitations period preclude converting "what is otherwise legal into something illegal." 362 U.S. at 419.[8] Accordingly, the Court held that a contract, lawful on its face, could not be found to be unlawful because it was entered into with a minority union, where the charge of illegality was filed more than six months after the contract was executed.

As the Board explained, the policies identified in *Bryan Mfg.* would clearly preclude an untimely unfair labor practice complaint challenging the validity

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[8] According to the Court, the policies underlying Section 10(b) are "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' " and "to stabilize existing bargaining relationships." 362 U.S. at 419.

of an employer's recognition of a successor union. Pet. App. A185. Those same policies would equally be "offended by an indirect attack on the validity of the merger process through a defense to a later withdrawal of recognition." *Id.* at A186. Petitioners did not contest the validity of the merger—and thereby Local 1529's majority status—until November 1982, seven months after they were first notified of the merger and had accepted Local 1529 as the representative of their employees. Under the principles of *Bryan Mfg.*, petitioners' challenge to Local 1529's status was barred by the policies underlying Section 10(b).

There is no merit to petitioners' contention (Pet. 10) that the Board's application of Section 10(b) is erroneous because that provision is "simply a statute of limitations regulating the General Counsel's prosecution of unfair labor practice matters." In order to fully effectuate the policies underlying Section 10(b), the Board and the courts have applied it to bar the assertion of stale unfair practice claims by employers and unions as a defense to other charges. See, *e.g.*, *NLRB* v. *Tragniew, Inc.*, 470 F.2d 669, 672-673 (9th Cir. 1972) (barring evidence of union's loss of certification election as defense to charge of refusal to bargain); *NLRB* v. *District 30, United Mine Workers*, 422 F.2d 115, 120-122 (6th Cir. 1969), cert. denied, 398 U.S. 959 (1970). Petitioners point to no contrary authority.

Petitioners also suggest (Pet. 10) that the decision below conflicts with *Bryan Mfg.*'s statement that Section 10(b) does not bar the use of evidence of earlier events "to shed light on the true character of matters occurring within the [six month] limitations period." 362 U.S. at 416-417. Petitioners did not seek to "shed

light" on anything that happened within six months of their withdrawal of recognition, however. Instead, they sought to justify their action by showing that the merger election, which occurred outside the six-month period, was unlawful. Thus, petitioners attempted to use stale evidence to "cloak with illegality" events that occurred outside the limitations period and which could not, therefore, have been made the subject of an unfair labor practice complaint. *Id.* at 417. The policy of Section 10(b) forbids such an indirect challenge to the validity of the merger.

3. Baker Bros. claims (Pet. 11-12) that the Board erred in attributing to it the anti-union conduct of three supervisors who were also members of the bargaining unit. This fact-bound claim does not merit review.

Under *Montgomery Ward & Co.*, 115 N.L.R.B. 645 (1956), enforced, 242 F.2d 497 (2d Cir.), cert. denied, 355 U.S. 829 (1957), conduct engaged in by a supervisor who is a member of the bargaining unit is attributable to the employer where there is evidence that the employer "encouraged, authorized, or ratified the supervisor's activities or acted in such a manner as to lead employees reasonably to believe that the supervisor was acting for or on behalf of management." 115 N.L.R.B. at 647. The central inquiry is whether the employee hearing a supervisor's threats would have just cause to believe that the supervisor was acting for and on behalf of the employer. *NLRB v. Schroeder*, 726 F.2d 967, 971 (3d Cir. 1984). The Board found that the supervisors told employees that Al Baker would not sign a new contract with the Union, that management would not negotiate with the Union, that management would reward employees with better wages and benefits if they ousted the

Union, and that if employees supported the Union they would lose their jobs. Pet. App. A191.[9] In addition, the Board found that after the decertification petition was filed Al Baker told employees that he appreciated their support and that as soon as he could "get rid of all the 'interruptions' " the company would "operate a lot smoother." *Ibid.* On these facts, it was entirely proper for the Board to conclude that "Al Baker furthered the reasonable perception that [the supervisors] were acting for and on behalf of management when they circulated the petition seeking ouster of the Union, solicited signatures, and made repeated coercive statements to the employees concerning the likely favorable management reaction." *Id.* at A192.

Baker Bros. mischaracterizes the Board's finding as a determination that Al Baker "ratified" the supervisors' conduct after the decertification petition had been filed and that this "ratification" retroactively "tainted" the petition. Pet. 4, 12. As is plain from the Board's analysis, the Board actually found that the bargaining unit employees reasonably believed the supervisors to be acting for and on behalf of Baker Bros. *at the time* they circulated the decertification petition.[10] Al Baker's comments after the petition was filed served merely to bolster that reasonable belief. The Board's factual findings,

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[9] These findings belie petitioners' suggestion that the decertification petition was "lawfully circulated" and that employees "exercise[d] * * * free choice in signing the petition." Pet. 12; see also Pet. 2 n.2.

[10] The court of appeals seems to have relied in part on a ratification theory, see Pet. App. A241, but it also agreed with the Board that the evidence "support[ed] the inference that [the supervisors] acted with Baker's approval." *Id.* at A242.

which were sustained by the court below (Pet. App. A241-A242), are supported by substantial evidence, and thus present no issue warranting further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45402